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In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

ERRY BROTHERS BRICK AND TILE COMPANY, ET AL.

TITION FOR A WRIT OF CERTIORARI TO THE UNITED TATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MERRY BROTHERS BRICK AND TILE COMPANY, ET AL.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Attorney General,[2] on behalf of petitioners, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit in the above-entitled cases.

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[1] Pursuant to Rule 23(5) of the Revised Rules of this Court, this petition for a writ of certiorari covers thirteen cases decided by the United States Court of Appeals for the Fifth Circuit. Although separate judgments were entered, all thirteen cases involve substantially identical questions. The cases (other than the title case) are: *United States of America* v. *Reliance Clay Products Co.*; *United States of America* v. *Estate of L. L. Stephenson, the First National Bank of Birmingham as Executor, et al.*; *United States of America* v. *Tupelo Brick & Tile Co.*; *United States of America* v. *Elgin-Butler Brick Co.*; *Paul Cobb, District Director of Internal Revenue* v. *Chattahoochie Brick Co.*; *United States of America* v. *Atlanta Brick & Tile Co.*; *United States of America* v. *Acme Brick Co.*; *Ellis Campbell, District Director of Internal Revenue Service and United States of America* v. *Carney Kirby and wife, Geneva Kirby, et. al.*; *United States of America* v. *Teague Brick & Tile Co.*; *United States of America* v. *Cherokee Brick & Tile Co.*; *United States of America* v. *Burns Brick Co.*; *United States of America* v. *Texas Vitrified Pipe Co.*

[2] For personal reasons, the Solicitor General has disqualified himself from participating in this litigation.

OPINIONS BELOW

The opinion of the District Court in *United States v. Merry Brothers Brick and Tile Co.* is reported at 145 F. Supp. 186. (R. 54-63.) The District Court did not file an opinion in *United States v. Reliance Clay Products Co.* The opinion of the Court of Appeals in these two cases (Appendix A, *infra*, pp. 23-30) is reported at 242 F. 2d 708. No opinions were written in the remaining companion cases.[3]

JURISDICTION

The judgments of the Court of Appeals in *United States v. Merry Brothers Brick and Tile Co.*, and *United States v. Reliance Clay Products Co.* were entered on March 27, 1957. (Appendix A, *infra*, pp. 23, 30.) Judgments of the Court of Appeals in the remaining cases were entered on April 25, 1957, with the exception of *United States v. Teague Brick & Tile Co.* (entered April 29, 1957), *United States v. Cherokee Brick & Tile Co.* and *United States v. Burns Brick Co.* (entered May 3, 1957), and *United States v. Texas Vitrified Pipe Co.* (entered May 10, 1957). (Appendix A, *infra*, pp. 30-40.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether "gross income from mining", on the basis of which percentage depletion for mineral deposits is allowable under Sections 23(m) and (n), and 114(b)(4) of the Internal Revenue Code of 1939, includes income derived from manufacturing merely because the

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[3] The *Merry Brothers* and *Reliance Clay* cases were heard and decided together by the court below. In the other cases, it was stipulated that judgments would be entered by that court in conformity with the decision in those cases.

mine owner, in addition to engaging in mining activities, transforms the mineral into a manufactured product and sells it as such.

The answer depends on whether the mine owner's manufacturing operations are to be considered "ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product", within the meaning of Section 114(b)(4)(B).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 23(m) and (n) and 114(b)(4) of the Internal Revenue Code of 1939, Sections 611(a) and 613(a), (b) and (c) of the Internal Revenue Code of 1954, Section 29.23(m)-1 of Treasury Regulations 111, and of Section 39.23(m)-1 of Treasury Regulations 118, are set forth in Appendix B, *infra*, pp. 41-56.

STATEMENT

Merry Brothers Brick and Tile Company.

The Merry Brothers Brick and Tile Company (hereinafter called Merry) is engaged in the business of mining clay, from which it manufactures burnt brick or tile, by applying the following processes (*Merry* R. 57-59):

(a) The clay is mined at several different pits simultaneously by draglines and loaded in dump cars which operate on railroad tracks and carry the clay to the plant.

(b) The clay is dumped from the cars into large feeders which mix the clay and reduce the large

chunks to a size that can be carried on a conveyor belt.

(c) The clay mined from the several different pits is discharged from the feeders on conveyor belts which carry it first to a disintegrator or crusher and then a storage shed, where it is blended and weathered.

(d) The clay blended and weathered in the storage shed is then loaded onto a conveyor belt which carries the clay to a set of smooth roll crushers, which further reduce the size of the chunks. In one of the plants there are two small additional granulators, or pug mills, through which the clay passes before reaching the smooth roll crushers.

(e) From these smooth roll crushers the clay is discharged onto another conveyor belt, which carries it by belt conveyors to another feeder where the clay is further blended or mixed.

(f) From the feeder the clay is discharged into the pug mill, which is a part of the brick machine wherein water is added as the final tempering process.

(g) From the pug mill the clay passes through a sealing die into and through a vacuum chamber where air is evacuated from the clay by a vacuum pump. The clay then falls into the extrusion section of the machine, where it is forced under pressure through various shapes of dies in long ribbons.

(h) The long ribbons of clay as extruded through the dies pass into the cutting machine, which cuts them into clay units of the desired size or length.

(i) The clay units as cut pass onto a conveyor belt and are then stacked by hand on dryer cars. These cars of brick are then moved to the dryer tunnels, where free water is evaporated from the clay units by warm air from fans which is blown on and over the units.

(j) When the free water is thus removed, the clay units are stacked either in periodic kilns, semi-continuous kilns, or continuous tunnel kilns.

(k) The clay units are then burned, either in periodic, semi-continuous or continuous tunnel kilns.

(l) The burnt brick and tile are then removed from the kilns.

(m) After they have been removed from the kilns, the burnt brick and tile are sorted and then loaded for shipment to purchasers.

In its returns for 1951, 1952, and 1953, Merry computed and deducted as percentage depletion five percent of the entire sales price of the finished burnt brick and tile. The Commissioner of Internal Revenue, in order to compute the allowable basis for depletion, *i.e.*, the gross income from mining, classified the foregoing processes in two groups, "Mining" and "Manufacturing". Processes (a) through (e), listed above, were placed in the "Mining" group and the remaining processes in the "Manufacturing" group. The Commissioner computed Merry's gross income from mining by dividing the direct mining costs by the total costs of mining and manufacturing, based upon the foregoing classification, and then multiplying the resulting percentage by the total gross income. The resulting amount, it was determined, represented that portion of

the total gross income allocable to mining, and five percent thereof was allowed as a depletion deduction. (*Merry* R. 12-14, 22, 56-57.)

In accordance with these computations, the Commissioner determined deficiencies in income and excess profits taxes for 1951 and 1952, and income taxes for 1953. Merry paid the deficiencies, with adjustments, and for the year 1954 it computed depletion and paid its tax liability on the same basis which the Commissioner determined should have been used in computing the allowable depletion for the prior years. Merry then filed claims for refund for the years 1951-1954 inclusive; the claims were denied, and suit for refund followed. The District Court overruled the Commissioner's determination and entered judgment for Merry in the principal amount of $361,932.06 plus interest. (*Merry* R. 6-7, 21, 54, 63-65.) The Court of Appeals affirmed. (Appendix A, *infra*, pp. 23-30.)

Reliance Clay Products Company:

The Reliance Clay Products Company (hereinafter called Reliance) is engaged in the business of mining clay, from which it manufactures burnt brick or tile by applying substantially the same processes as set forth above in the case of Merry. (*Reliance* R. 77-78, 86-88.)

In its income tax returns for the years 1951 and 1952, Reliance computed and deducted percentage depletion on the basis of the entire sales price of the finished burnt brick and tile. The Commissioner determined the allowable depletion by classifying the processes as between mining and manufacturing, and by allocating the gross income from the sales of the burnt brick and

tile on the basis of such classification, in substantially the same manner as in the *Merry* case. (*Reliance* R. 83-86, 88-91.)

Reliance paid the resulting deficiencies and filed claims for refund, which were denied, and suit for refund followed. (*Reliance* R. 81-83.) The District Court overruled the Commissioner's determination and entered judgment for the taxpayer in the amounts of $22,944.20 and $3,228.61 for 1951 and 1952, respectively, plus interest. (*Reliance* R. 75-76.) The Court of Appeals affirmed. (Appendix A, *infra*, pp. 23-30.)

Companion cases.

The facts and issues in the remaining cases are in all material respects the same as in the *Merry* and *Reliance* cases. Accordingly, the parties stipulated, in all but the last four above-styled cases (see p. 2, note 3, *supra*), that in the event the Court of Appeals for the Fifth Circuit affirmed the decisions in *Merry* and *Reliance*, decisions were to be entered forthwith in favor of the taxpayers. After the entry of judgment in favor of taxpayers in *Merry* and *Reliance*, the Court of Appeals entered judgments in favor of taxpayers in the stipulated cases. (Appendix A, *infra*, pp. 30-37.) In the four remaining companion cases (*United States* v. *Teague Brick & Tile Co.*, *United States* v. *Cherokee Brick & Tile Co.*, *United States* v. *Burns Brick Co.*, and *United States* v. *Texas Vitrified Pipe Co.*), the parties stipulated, subsequent to the decisions in *Merry* and *Reliance*, for entry of judgment in favor of taxpayers, and the Court of Appeals entered judgment accordingly. (Appendix A, *infra*, pp. 37-40.)

REASONS FOR GRANTING THE WRIT

1. These cases present in common an important question of statutory construction, affecting the collection of hundreds of millions of dollars of revenue. Sections 23(m) and (n) and 114(b)(4) (Appendix B, *infra*, pp. 41-44) authorize a deduction for depletion of natural mineral deposits, measured by a percentage of the mine owner's "gross income from the property", which is defined as "the gross income from mining". The term "mining" is defined as including "not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product".[4] Broadly stated, the problem is whether, for purposes of computing allowable percentage depletion, income from "mining" may include income derived from manufacturing or other non-mining activities. More particularly, the issue is whether manufacturing operations carried on by a mine owner in order to convert his mineral product into a manufactured product may properly be considered "ordinary treatment processes normally applied * * * to obtain the commercially marketable mineral product", within the purview of the statute.

The taxpayers in the instant cases mine clay, from which they ultimately produce burnt brick and tile, and then sell the finished manufactured products.[5] In com-

[4] Together with the transportation of the mineral to the plants or mills in which the ordinary treatment processes are applied, within specified mileage limits.

[5] After the clay is mined, it is carried to an adjacent plant, where it is mixed, reduced in size, and screened into a machine (pug mill) in which water is added as a final tempering process. The clay is

puting and deducting the percentage allowance for depletion[6] taxpayers used as a basis the gross income (sales price) realized from the finished products. The Commissioner determined deficiencies on the ground that "the gross income from mining" (the statutory basis on which percentage depletion is allowable for mineral deposits) is confined to income attributable to mining operations, and does not extend to income attributable to manufacturing operations. Applying the principles and formula embodied in the long-standing Treasury Regulations,[7] the Commissioner allocated the

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then passed into a brick machine, first entering an evacuation chamber where air is evacuated from the clay by a vacuum pump, and then an extrusion section where it is forced through various types of dies onto long ribbons. The ribbons are then passed into a cutting machine which cuts them into units of the desired size. These units are then moved to dryer tunnels, where the water is evaporated therefrom by open gas fires. They are then burned in kilns by natural gas fires, and the resulting burnt brick and tile is then removed and loaded for shipment.

[6] The percentage of "gross income from the property" allowable as a depletion deduction varies with different types of minerals. See Section 114(b)(4)(A). In 1951, brick and tile clay, and fire clay, were added to the category of mineral deposits for which percentage depletion is deductible, the percentages allowable being five and fifteen percent, respectively. See Section 319 of the Revenue Act of 1951, c. 521, 65 Stat. 452.

[7] Section 29.23(m)-1(f) of Treasury Regulations 111, as amended by T.D. 5413, 1944 Cum. Bull. 124 (Appendix B, *infra*, pp. 49-52), which reads in part as follows:

> If the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine, "gross income from the property" means the amount for which such product was sold, but, *if the product is* transported or *processed (other than by the ordinary treatment processes described below) before sale, "gross income from the property" means* the *representative market or field price* as of the date of sale of a mineral product of like kind and grade *as beneficiated by the ordinary treatment processes actually applied*, before transportation of such product. *If there is no such representative*

total amount realized by the taxpayers from the sale of the finished products as between their mining and manufacturing operations, and allowed percentage depletion on the basis of the income allocable to mining.

Rejecting the Commissioner's interpretation of the statute as embodied in the Regulations, and reaffirming its prior decision in *United States v. Cherokee Brick & Tile Co.*, 218 F. 2d 424, the court below has construed the statute as authorizing percentage depletion deductions on the basis of the entire sales proceeds of the finished manufactured product, notwithstanding the fact that a substantial portion of the proceeds reflects a return of, and is attributable to, the costs of what are patently manufacturing and other non-mining operations. In effect, the court has held that the depletion base prescribed by Congress ("the gross income from mining") extends to the total price received for a synthetic product resulting from *any and all processes* applied by the mine owner in transforming the mineral deposit into an end product sold, simply because the first commercially marketed product is the end product.[8]

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market or field price (as of the date of sale), *then there shall be used in lieu thereof the* representative market or field *price of the first marketable product* resulting from any process or processes (or, if the product in its crude mineral state is merely transported, the price for which sold) *minus the costs and proportionate profits attributable to* the transportation and *the processes beyond the ordinary treatment processes*. [Emphasis supplied.]

[8] Reiterating its position in the *Cherokee* case, the court below stated (Appendix A, *infra*, pp. 24-25):

> The statutory language is clear and unambiguous, which is that gross income from mining must include the income from ordinary treatment processes which must be applied to the ore or mineral in order to obtain the commercially marketable mineral product, that is, the first product which is marketable

While the *Cherokee* and the instant cases involve the proper statutory basis for depletion of certain types of clay (brick and tile and fire clays), the holding below appears broad enough to encompass a number of other mineral deposits for which percentage depletion is allowable. See Section 114(b)(4)(A). Indeed, the holding has been followed by three other Courts of Appeals, and it has been extended to two other classes of mineral deposits (talc and cement rock).[9] If permitted to stand, the decision below will result in the loss of a very substantial amount of revenue which the Treasury, under its established interpretation of the statute, has consistently regarded as properly payable by mine owners. The Acting Commissioner of Internal Revenue has advised the Department of Justice that a survey conducted by the Internal Revenue Service (see Appendix C, *infra*, pp. 57-60) indicates that (1) there are at least 370 cases now in litigation or pending administratively, involving similar minerals (clay, talc, cement rock and lime), in which taxpayers are attempting to apply the rule adopted by the court below to their own integrated mining-manufacturing operations for the years 1951-1954 in order to obtain the broad depletion base and the larger depletion allow-

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in commerce. There is no provision in the statute for excluding any process before such a marketable product is reached. The only restriction is that the processes must be the ordinary treatment processes normally applied by mine owners or operators.

[9] The rule was extended by the Fourth Circuit to talc (*Townsend v. Hitchcock Corp.*, 232 F. 2d 444) and by the First Circuit to cement rock (*Dragon Cement Co. v. United States*, decided May 14, 1957). And it has been applied by the Tenth Circuit in the case of brick and tile clay (*United States v. Sapulpa Brick & Tile Corp.*, 239 F. 2d 694). The Government is also filing a petition for a writ of certiorari in the *Dragon Cement* case.

ances which will thereby result; (2) the tax loss which would result from an application of the rule to these contested cases approximates $116,000,000; (3) the continued application of the rule to these minerals would result in an annual revenue loss of at least $49,000,000 for each succeeding taxable year; (4) attempts have been made, in the form of claims for the years 1951 through 1954, to apply the rule to nineteen other minerals covered by the statute;[10] and (5) if the rule is applicable to these other minerals, the tax loss resulting from such claims will approximate $17,476,869 and the potential recurring revenue loss will approximate an additional $39,523,040 per year. Moreover, it is the opinion of the Commissioner of Internal Revenue, based upon the numerous attempts already made to extend the rule to other minerals, that it is not unreasonable to expect that similar attempts will be made, based on alleged similarities to the minerals here involved, to apply the rule to additional minerals listed under Section 114(b)(4), with an inevitable increase in litigation and potential revenue loss. (Appendix C, *infra*, p. 58.) And since the percentage depletion provisions of the Internal Revenue Code of 1954 (Sections 611 and 613 (Appendix B, *infra*, pp. 44-48)) are substantially the same as those of the 1939 Code, the question is a recurring one and will continue in future years to have great importance in the administration of the taxing statute.

2. In holding that percentage depletion is allowable on the basis of the *total* gross income realized by a mine owner from integrated mining-manufacuring operations, including the portions allocable to the manufac-

[10] These claims are being contested.

turing processes, the court below extended the depletion allowance beyond the boundaries envisioned by Congress.

The court below disagreed with the Treasury's interpretation, which applies the allowable percentage solely to the gross income allocable to the mining activities, on the theory that it was contrary to the "clear and unambiguous" language of the statute. (Appendix A, *infra*, p. 24.) We submit that the administrative interpretation is in harmony with the congressional purpose and that in no event are the Treasury Regulations so plainly inconsistent with the statute as to warrant their nullification by the courts. See *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378; *Lykes* v. *United States*, 343 U.S. 118, 127. Certainly, the legislative intent cannot be said to be so free from doubt—as the court below assumed—as to leave no room for administrative interpretation.

Analysis of the basic nature and purpose of the percentage depletion provisions, their terms, and their legislative and administrative history, shows that the depletion base ("gross income from mining") contemplated by Congress has reference to income received from a mineral product resulting from a definite pattern of treatment processes, *i.e.*, concentration or purification processes which are proximately related to mining operations. Contrary to the view of the court below, Congress did not propose that the depletion base be measured by the value of a synthetic, manufactured product which was the result of any and all processes necessary to bring the mineral to a point of marketability.

(a) The allowance of a deduction for depletion is simply a recognition by Congress that a mineral deposit will become exhausted as a consequence of its removal from the earth in the course of a mining operation, and that the mine owner is entitled to recovery of his capital investment in the deposit. This has been the basic purpose of the depletion allowance from the beginning (*Stanton* v. *Baltic Mining Co.*, 240 U.S. 103; *Von Baumbach* v. *Sargent Land Co.*, 242 U.S. 503; *Burnet* v. *Harmel*, 287 U.S. 103), and it remains so today (*Kirby Petroleum Co.* v. *Commissioner*, 326 U.S. 599). As this Court said in the *Kirby* case, p. 603, percentage depletion is designed to provide for "the restoration of the taxpayer's capital". To confine the basis upon which percentage depletion is to be measured to the gross income derived from mining operations merely effectuates the underlying purpose of the deduction.

(b) The language of the statute, read as a whole, also supports the Treasury's interpretation. If, as the court below assumed, Congress wished to make the entire sales proceeds of the first marketable product the basis for computing percentage depletion on the mined property—irrespective of whether manufacturing processes are superimposed upon the mining processes in producing the property sold—it could readily and simply have said so. There would have been no need for Congress to define "gross income from the property" as "the gross income *from mining*", and in turn to define the term "mining" as including "ordinary *treatment* processes normally applied by mine owners or operators in order to obtain the commercially marketable *mineral* product". (Emphasis supplied.) Nor would there have been any need for Congress to elaborate the definition by specifying the particular

processes includable in the category of "treatment processes" and others which are excludable. That Congress used such qualifying language to define "gross income from the property" furnishes strong indication, in and of itself, that the stage at which a product is marketed or becomes commercially marketable was not meant to be the exclusive test for determining the depletion base.

(c) The legislative and administrative history of the statutory provisions in question further supports the Treasury's interpretation. Prior to the Revenue Act of 1943, the provisions governing percentage depletion [11] did not define the term "gross income from the property" to which the percentage was to be applied. Congress deemed it best, in dealing with the highly technical factors entering into the depletion allowance, to write the Act as simply as possible and to leave the technical features for administrative regulations.[12] Regulations were promulgated under the 1933 Act defining "gross income from the property" as the selling price of the "crude mineral product". If the crude mineral product was not sold as such but was further processed, "gross income from the property" meant the field price *before* the application of any processes (other than crushing, grinding or purification processes) to which the crude mineral product may have been subjected. In the event that no representative field price existed for the crude mineral product after the purification processes, a hypothetical field price was

[11] Section 204(c)(2) of the Revenue Act of 1926, c. 27, 44 Stat. 9; Sections 23(l), 114(b)(3) and (4) of the Revenue Act of 1932, c. 209, 47 Stat. 169.

[12] See Section 23(l) of the Revenue Act of 1932, *supra*, and similar provisions of later Acts, delegating to the Commissioner authority to issue Regulations providing for a "reasonable allowance" for depletion.

to be calculated; this was to be done by taking the first marketable product, regardless of the nature of the product or the processes to which it had been subjected, and deducting therefrom amounts allocable to processes beyond the allowable ones. Treasury Regulations 77, promulgated under the Revenue Act of 1932, Article 221(g).

In 1943 Congress added Section 114(b)(4)(B) (the provision here applicable) to the 1939 Code.[13] This section defined "*gross income from the property*" as "the *gross income from mining*", with "mining" being defined as including "the *ordinary treatment processes* normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products". (Emphasis supplied.) The administrative background which led to this refinement of the definition shows that Congress was primarily concerned not with the marketability of the mineral product, but with the nature of the processes which were to be considered "mining" processes. Under its Regulations, the Treasury Department had been treating all substantially equivalent concentration or purification processes as mining processes, whether or not specifically listed in the Regulations, but, some time prior to 1943, it began disallowing many purification processes even though they were similar in function to those specified in the Regulations. This was brought to the attention of Congress,[14] which responded by enacting the 1943 provision

[13] Section 124(c) of the Revenue Act of 1943, c. 63, 58 Stat. 21.

[14] See the testimony of Donald H. McLaughlin, Senate Hearings before the Committee on Finance, 78th Cong., 1st Sess., on Revenue Act of 1943, pp. 527-529. See, also, testimony of Robert M. Searls, representing the California Chapter of The American Mining Congress (1 House Hearings before the Committee on Ways and Means, 77th Cong., 2d Sess., on Revenue Revision of 1942, pp. 1199-1202).

in question. Insofar as the includable "processes" are concerned, the provision is virtually identical in pattern with the then existing Regulations, *i.e.*, the includable processes consist of *treatment* processes which are characteristic of *mining* as distinguished from manufacturing operations. Indeed, the Senate Finance Committee Report, at the time of the enactment of this provision, stated (S. Rep. No. 627, 78th Cong., 1st Sess., pp. 23-24 (1944 Cum. Bull. 973, 992)) that "[t]he definition here prescribed * * * is in accord with the original regulations and the Bureau practices and procedures thereunder." That the 1943 amendment was intended to codify the Regulations issued under the 1932 Act is confirmed by the fact that it was made retroactive to 1932.[15]

The Treasury Regulations under the 1939 Code which the Commissioner here applied and the court below viewed as invalid contain essentially the same provisions as the predecessor Regulations in terms of the nature and scope of the processes which may be treated as "mining" processes. And when Congress in 1951 added brick and tile clay and fire clay to the categories of minerals for which percentage depletion may be deducted,[16] the Commissioner merely applied the provi-

[15] Section 124 (d) of the Revenue Act of 1943, *supra*. See, also, S. Rep. No. 2375, 81st Cong., 2d Sess., p. 53 (1950-2 Cum. Bull. 483, 522). Nothing in the legislative or administrative history justifies the supposition of the court below (Appendix A, *infra*, pp. 26, 27, 28-29) that Congress was only seeking a "simple, practical rule" for computing percentage depletion, based solely upon the marketability of a product, regardless of the nature of the processes which were applied to obtain the product. The congressional inquiry at the time of the enactment of the provision was directed toward the processes involved, and the prior administrative practice which Congress approved always considered the nature of the processes involved to be significant.

[16] Section 319 of the Revenue Act of 1951, c. 521, 65 Stat. 452.

sions of the Regulations to determine the gross income derived from the mining of clay.

The applicable Regulations were issued shortly after the 1943 addition to the 1939 Code of the statutory provision in question (Section 114(b)(4)(B)). This Court has "many times declared that Treasury Regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons" (*Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501). This established principle applies with special force where, as here, the subject matter is technical and complex, calling for knowledge of mineralogy and mineralogical processes. See *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 103. Furthermore, since the time that the Regulations were promulgated (1944), Congress has several times extensively amended the 1939 Code without changing the provision to which the Regulations are addressed. Under equally familiar rules governing the construction of taxing statutes, the Treasury's interpretation must be deemed to have received implied legislative approval by virtue of substantial re-enactment of the statute. *Lykes* v. *United States*, 343 U.S. 118, 129; *Commissioner* v. *Flowers*, 326 U.S. 465, 469. The most that may be argued in taxpayers' favor is that the statute in question is ambiguous and hence susceptible of more than one reasonable interpretation. The Treasury's interpretation cannot be said to be any less reasonable, however, than the one advanced by taxpayers and adopted by the court below. Where a statute is susceptible of different reasonable interpreta-

tions, the construction adopted by the agency responsible for its administration should be accepted by the courts. *United States* v. *Allen-Bradley Co.*, 352 U.S. 306; *Commissioner* v. *South Texas Co.*, *supra*. See *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143. The court below erred in disregarding these basic principles of statutory construction.

3. The decision below produces grave inequities within and among classes of taxpayers. The depletion deduction provisions, no less than other tax deduction provisions, are matters of legislative grace which must be strictly construed,[17] particularly where, as here, the deduction runs in favor of a selected group of taxpayers, namely, those whose income-producing activities consist of mining. To reduce further the tax liability of a particular member of that group by extending the special percentage depletion allowance to gross income derived from his manufacturing activities, solely because he chooses to combine such activities with his mining activities, not only accords him preferential tax treatment *vis-a-vis* other members of the group; it also places an unfair additional tax burden upon taxpayers who engage solely in manufacturing activities, and, indeed, upon all other classes of taxpayers.[18]

[17] *United States* v. *Olympic Radio & Television*, 349 U.S. 232, 235-236; *Deputy* v. *duPont*, 308 U.S. 488, 493; *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440.

[18] Moreover, the decision below permits miners of brick and tile clay to control the extent of the depletion allowance by electing to manufacture the more expensive burnt brick and tile products, such as face brick, colonial flash brick, and other special forms of burnt brick, and thus obtain a broader depletion base than those who manufacture and sell the cheaper forms of common brick, although they both use the identical amount of the crude mineral, brick and tile clay.

No valid reason appears, and none is suggested by the court below, for imputing to Congress an intent to accord to mine owners who engage in integrated mining-manufacturing activities a depletion allowance based upon gross income derived from their non-mining activities, and thus to single out these taxpayers for preferred tax treatment. Even if the legislative intent in this respect were not as plain as we submit it is; "[a] desire for equality among taxpayers is to be attributed to Congress, rather than the reverse". *Colgate Co.* v. *United States*, 320 U.S. 422, 425.

4. Quite apart from the inequitable results it otherwise produces, the decision below ignores the repeated admonitions of this Court that the federal revenue laws are to be interpreted "so as to give a uniform application to a nationwide scheme of taxation". *Burnet* v. *Harmel*, 287 U.S. 103, 110; *United States* v. *Gilbert Associates*, 345 U.S. 361, 364; *Lyeth* v. *Hoey*, 305 U.S. 188, 194; *United States* v. *Pelzer*, 312 U. S. 399, 402-403. In holding that "ordinary treatment processes", as that phrase is used in Section 114(b)(4)(B), embraces any and all processes applied by a mine owner up to a point where the product becomes commercially marketable, including processes which are essentially manufacturing in character, the court below overlooked the economic fact that the stage of marketability may and often does vary from mineral to mineral and, even as respects the same mineral, from area to area. Under the reasoning of the court below, the statutory basis for percentage depletion ("gross income from mining") will differ markedly as between taxpayers who mine one type of mineral

rather than another,[19] and as between taxpayers who, although they are engaged in mining the same type of mineral, do their mining in different localities.[20] Indeed, under the rationale of the opinion below, it has been held that the very same taxpayer may use different depletion bases with respect to the same class of mineral merely because the mineral was extracted from two separate mines.[21] No such incongruous results were intended by Congress. "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be" (*United States* v. *Gilbert Associates*, *supra*, p. 364). That principle is fully applicable here.

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[19] It is undisputed, and Section 114(b)(4)(B) (iv.) explicitly provides, that in the case of certain metals and ores "which are not customarily sold in the form of the crude mineral product", the term "ordinary treatment processes" includes only designated processes ("crushing, grinding and beneficiation by concentration * * * or by substantially equivalent processes"); additional processes applied in order to convert the crude mineral product into a marketable product are not specified as includable. The decisions below, on the other hand, accord miners of brick and tile clay favored treatment by permitting them to include any and all processes applied to obtain the finished marketable product.

[20] For example, in two of the instant cases (*United States* v. *Acme Brick Co.*, and *United States* v. *Elgin-Butler Brick Co.*) involving fire clay, mined in Texas, the first commercial product was not reached until the mineral had been converted into burnt brick and tile. Yet in other geographical areas (*e.g.*, California, Colorado, Illinois, Indiana, Missouri, Ohio, and Pennsylvania) the first commercially marketable product is the crude fire clay itself. See the *Minerals Yearbook*, 1951, United States Department of Interior, Bureau of Mines, pp. 293-295.

[21] See *Riverton Lime and Stone Co.* v. *Commissioner*, 28 T.C. No. 49.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT BROWNELL, JR.,
*Attorney General.**
JOHN N. STULL,
Acting Assistant Attorney General.
HARRY BAUM,
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Attorneys.

JUNE 1957.

* See footnote 2, *supra*.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16373

UNITED STATES OF AMERICA, APPELLANT

versus

MERRY BROTHERS BRICK AND TILE COMPANY, APPELLEE

Appeal from the United States District Court for the Southern District of Georgia

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No. 16323

UNITED STATES OF AMERICA, APPELLANT

versus

RELIANCE CLAY PRODUCTS COMPANY, APPELLEE

Appeal from the United States District Court for the Northern District of Texas

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(March 27, 1957)

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges

HUTCHESON, Chief Judge:

These appeals from judgments of the United States District Court for the Northern Districts of Georgia [1]

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[1] Dated July 3, 1956, opinion reported 145 F. Supp. p. 186.

and Texas,[2] respectively, involve claims for refund of income and excess profits taxes. They present on the same basic facts the same basic question, and have therefore been submitted and argued together.

This quesion is whether this court will depart from its decision in *U.S. v. Cherokee Brick & Tile Co.*, 218 F(2) 424, in which, affirming the judgment and approving the opinion of the United States District Court for the Middle District of Georgia, in *Cherokee Brick & Tile Co. v. United States*, 122 F. Sup. 59, we said, at pages 424-25, of the pertinent portion of Sec. 114[3] of the Internal Revenue Code:

> "The statutory language is clear and unambiguous, which is that gross income from mining must include the income from ordinary treatment processes which must be applied to the ore or mineral in order to obtain the commercially marketable mineral product, that is, the first product which is marketable in commerce. There is no provision in the statute for excluding any process before such a marketable product is reached. The only restric-

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[2] Dated May 14, 1956, no written opinion.

[3] "(b). Basis for depletion

* * * * * * *

"(4) (A) The allowance for depletion under Sec. 23(m) in the case of the following mines and other natural deposits shall be—(i) in the case of * * * brick and tile clay * * * 5 per centum, * * * of the gross income from the property during the taxable year. * * *

"(B) Definition of gross income from property. As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining' as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, * * *"

tion is that the processes must be the ordinary treatment processes normally applied by mine owners or operators.

"The complaint alleges that, of the brick and tile clay mined in the United States, there is opportunity for the sale of only a negligible quantity before it is put into the form of burnt brick and tile. This allegation is admitted in the answer of the appellant. For this and other reasons (but mainly for this one) stated in the opinion of the district court, above cited, the judgment appealed from should be affirmed."

Conceding that the cases were decided below in accordance with our decision in the Cherokee case and that if that decision stands, they must be affirmed, the United States, stating: "Since this decision, the United States District Court of Maine, in *Dragon Cement Co. v. United States*, 144 F. Supp. 188", has, declining to follow the Cherokee decision, put forward an interpretation of its own of the statute, goes on to say:

"In view of this interpretation and the great number of decisions which have arisen within this circuit following the decision in Cherokee Brick & Tile Co., and which involve substantial amounts of revenue, the government respectfully asks this court to reconsider its decision."

Pointing out that, with the exception of that in the Dragon case, all of the numerous decisions in the district courts in this and other circuits and of the Courts of Appeals for the Fourth Circuit, in *Townsend v. The Hitchcock Corp.*, 232 F(2) 445, and the Tenth Circuit, in *U.S. v. Sapulpa Brick & Tile Co.*, . . . F(2) . . . , have agreed with and approved our decision, appellees insist that the grounds now put forward in support of its reconsideration present no sound reasons therefor.

They urge upon us moreover that if we should enter upon such a reconsideration of the decision, the result would only be to reaffirm it, since the undisputed facts and every sound consideration of statutory construction and application support indeed compel the conclusion that it was right and should be adhered to.

Upon the fullest and most careful re-examination and reconsideration of our decision in the Cherokee case, in the light of the records and the briefs and arguments in that case and these, we agree that this is so. Because it is and because in their decisions the district court, and this court dealt adequately and correctly with the question presented in it and here, we will not undertake to restate or further elaborate upon the reasons they gave but will content ourselves with saying that, upon the plain and simple consideration set down and for the reasons pointed up in the Cherokee case, we decline to depart from the decision in it, and, on its authority, affirm the judgments appealed from.

We think it not amiss, however, to say that we have taken particular note of and approve the comment in appellee Reliance Clay Products Company's brief.[4]

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[4] "As one of the principal reasons for asking this Honorable Court to overrule the Cherokee case, the Government cites a District Court decision from the District of Maine, Dragon Cement Co. v. United States, 144 F. Supp. 488, a case involving cement rock. The Court there held that the cement which the taxpayer sold was not the 'commercially marketable mineral product' within the meaning of Section 114(b)(4)(B), although it was shown that only negligible quantities of cement rock could be sold before it was put in the form of cement.

"The Court reached this conclusion by a curious process of reasoning. It stated that cement is not a 'mineral product' within the statute, because chemical reactions in the kiln change the cement rock into a 'synthetic product'. The Court held that 'the emphasis must here be upon the word "mineral" as a noun', and that, therefore, a 'mineral product' is a product 'still in a mineral state.'

"The Court thus rewrote the statute to refer to the 'commercially marketable mineral', rather than the 'commercially marketable

We have also taken particular note of and agree with Proposition No. 2 in Merry Brothers' brief, "*The government's attack on the Cherokee case is based on the fallacious assumption that the Cherokee decision allows depletion on 'manufacturing processes'*" (emphasis supplied), and its argument thereunder reproduced in part in the margin,[5] as well as its corrollary

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mineral product or products.' *Furthermore, it ignored completely the fact that Congress intended Section 114(b)(4)(B) to provide a simple marketable product rule to obtain the starting point for the computation of the percentage depletion deduction.* The Court in the Dragon Cement case recognized that, under its interpretation of 'mineral product', there never is a 'commercially marketable mineral product' obtained from cement rock. Thus the decision in the Dragon Cement case completely frustrates the purpose of Congress to provide the marketable product rule for computing the depletion deduction for all ores and minerals granted percentage depletion by Section 114(b)(4), including cement rock and brick and tile clay. * * *

"The Court in the Dragon Cement case ignored the plain obvious and generally understood meaning of 'mineral product' as will be shown below. It seized upon the word 'mineral' as the crucial word in the statutory phrase 'the commercially marketable mineral product or products.' That the word 'mineral' is not the crucial word in the statutory phrase is made clear by the Senate Finance Committee Report, quoted above, explaining the meaning of Sec. 114(b)(4)(B), which that Committee added to the Revenue Act of 1943:

> "The purpose of the provision is to make certain that the ordinary treatment processes which a mine operator would normally apply to obtain a *marketable product* should be considered as a part of the mining operation. * * *". (emphasis supplied) Sen. Rep. 627, 78th Cong., 1st Sess. p. 23.

"Although the draft of the bill to which this Report referred contained the word 'mineral' and the phrase was worded exactly the same as it was in the final Act, the Committee did not even mention the word 'mineral' in explaining that the purpose of the provision is to enable the mine operator to obtain a 'marketable product.'" (emphasis supplied).

[5] "The Government's basic argument is not related to the language of the statute, but rests rather upon the theory or 'concept' of depletion which, the Government asserts, Congress had in mind

"*that the Government's argument ignores the obvious fact that Congress intended Sec. 114(b)(4) to provide a simple, practical rule which could easily be applied to compute the percentage depletion deduction*" (emphasis supplied) and its argument in support reproduced in part here:

> "* * * we might also point out here that the Government's argument completely ignores the obvious fact that Congress intended Sec. 114(b)(4) to provide a simple, practical rule which could be

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when it granted the deduction. The Government argues, basically, that in the light of the theory of depletion it is unreasonable to suppose that Congress would have provided a deduction based on the gross income from the sale of 'manufactured' or 'finished' products such as brick and tile. The Government's brief undertakes to confuse the issue by giving the impression that the statute allows depletion on 'mining' or 'mining processes' and that this Court in the Cherokee case sustained a deduction for depletion not only on 'mining processes' but on 'manufacturing processes' or on a 'manufactured product'.

"Nothing could be further from the truth. Depletion is not allowed on any process, 'mining' or 'manufacturing', and is not allowed on any product. It is just as absurd to talk of allowing depletion 'on' the first 'mining' process of extracting clay from the ground, as it is to talk of allowing depletion 'on' the last 'manufacturing' process of burning the clay in the kiln. On the contrary, depletion is allowed to compensate the mine owner for exhaustion of his natural deposit. But instead of limiting the depletion deduction to a recovery of the cost of the natural deposit, Congress has chosen to allow the deduction to be computed as a stated percentage of the selling price of the 'commercially marketable mineral product', the selling price of the mineral product for which a commercial market exists. It has done so by defining 'gross income from the property' in Sec. 114(b)(4)(B) to include not only the income derived from the extraction process but also the income from processes applied to the ore or mineral, after extraction from the natural deposit, to obtain the commercially marketable mineral product. But in no sense does this mean that depletion is allowed 'on' any of the processes or 'on' the products produced thereby, or that such processes or products are 'depleted'. We feel that this simple analysis disposes of the Government's whole argument."

easily applied to compute the percentage depletion deduction.

"In order to compute a percentage depletion deduction, there must be a dollar base to which to apply the applicable percentage. Congress elected to use the marketable product rule as a simple means to provide this dollar base. With this dollar base established in Subparagraph (B) of Section 114(b)(4), Congress can then set the applicable rates in Subparagraph (A) to produce the dollar amount of depletion which it wishes to grant in the case of each particular type of natural deposit without disturbing the simple means for determining the dollar base. Of course, the processing necessary to obtain marketable products from the ores and minerals mined from the various types of natural deposits will vary greatly, but this fact can be taken into account in fixing the applicable rates. Thus, Congress has set rates in Sec. 114(b)(4)(A) which vary from 5% to 23%, and these rates can be raised or lowered as Congress sees fit.

"* * * If Congress upon further consideration should feel that applying the applicable rate to the gross income from any product, whether or not it is a 'manufactured' product, produces too large a depletion deduction, and should wish to decrease that deduction, it has only to lower the rate while still using as a base the gross income from the marketable product.

"In spite of its effort to conceal the fact, the Government's argument in sum and substance is merely that 5% of the selling price of burnt brick and tile is too large a deduction to allow the mine owner as compensation for that part of the brick and tile clay deposit consumed in producing that

brick and tile. However, the amount of the deduction to be allowed to the miners of brick and tile clay is a matter exclusively for Congress. The Government, therefore, recognizing that it cannot ask this court to change the rate of 5% specified in the statute for brick and tile clay, seeks instead to have this court rewrite the statute by changing the dollar base to which the rate is applied, as the court did in the Dragon Cement case."

The judgments are AFFIRMED.

[Original Filed—April 25, 1957]

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 16522

UNITED STATES OF AMERICA, APPELLANT,

versus

ESTATE OF L. L. STEPHENSON, THE FIRST NATIONAL BANK OF BIRMINGHAM, AS EXECUTOR, ET AL., APPELLEES.

Appeal from the United States District Court for the Northern District of Alabama

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

By the COURT:

Pursuant to the Stipulation, and Order entered in the above entitled cause on March 8, 1957 that in the event

this Court affirms the decisions in *United States* v. *Reliance Clay Products Co.* (Docket No. 16323), and *United States* v. *Merry Brothers Brick and Tile Co.* (Docket No. 16373), then decision shall be entered forthwith in favor of the taxpayer in the above-entitled case, and it appearing that the judgment of the District Court in cases Nos. 16323 and 16373 were affirmed on March 27, 1957.

It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

[Original Filed—April 25, 1957]

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 16525

UNITED STATES OF AMERICA, APPELLANT,

versus

TUPELO BRICK AND TILE COMPANY, APPELLEES.

Appeal from the United States Distrit Court for the Northern District of Mississippi.

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

By the COURT:

Pursuant to the Stipulation and Order entered in the above entitled cause on March 8, 1957 that in the event this Court affirms the decisions in *United States*

v. *Reliance Clay Products Co.* (Docket No. 16323), and *United States* v. *Merry Brothers Brick and Tile Co.* (Docket No. 16373), then decision shall be entered forthwith in favor of the taxpayer in the above-entitled case, and it appearing that the judgment of the District Court in cases Nos. 16323 and 16373 were affirmed on March 27, 1957,

It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[Original Filed—April 25, 1957]

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 16547

UNITED STATES OF AMERICA, APPELLANT,

versus

ELGIN-BUTLER BRICK COMPANY, APPELLEE

Appeal from the United States District Court for the Western District of Texas.

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges.

By the COURT:

Pursuant to the Stipulation and Order entered in the above entitled cause on March 28, 1957 that in the event this Court affirms the decisions in *United States* v. *Reliance Clay Products Co.* (Docket No. 16323),

and *United States* v. *Merry Brothers Brick and Tile Co.* (Docket No. 16373), then decision shall be entered forthwith in favor of the taxpayer in the above-entitled case, and it appearing that the judgment of the District Court in cases Nos. 16323 and 16373 were affirmed on March 27, 1957.

It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[Original Filed—April 25, 1957]

IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 16562

PAUL COBB, DISTRICT DIRECTOR OF INTERNAL REVENUE, APPELLANT,

versus

CHATTAHOOCHEE BRICK COMPANY, APPELLEE

Appeal from the United States District Court for the Northern District of Georgia

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges

By the COURT:

Pursuant to the Stipulation, and Order entered in the above entitled cause on March 8, 1957 that in the event this Court affirms the decisions in *United States* v. *Reliance Clay Products Co.* (Docket No. 16323), and *United States* v. *Merry Brothers Brick and Tile Co.*

(Docket No. 16373), then decision shall be entered forthwith in favor of the taxpayer in the above-entitled case, and it appearing that the judgment of the District Court in cases Nos. 16323 and 16373 were affirmed on March 27, 1957,

It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[Original Filed—April 25, 1957]

IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 16563

UNITED STATES OF AMERICA, APPELLANT,

versus

ATLANTA BRICK AND TILE COMPANY, APPELLEE

Appeal from the United States District Court for the Northern District of Georgia

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges

By the COURT:

Pursuant to the Stipulation, and Order entered in the above entitled cause on March 8, 1957 that in the event this Court affirms the decisions in *United States* v. *Reliance Clay Products Co.* (Docket No. 16323), and *United States* v. *Merry Brothers Brick and Tile Co.* (Docket No. 16373), then decision shall be entered

forthwith in favor of the taxpayer in the above-entitled case, and it appearing that the judgment of the District Court in cases Nos. 16323 and 16373 were affirmed on March 27, 1957,

It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[Original Filed—April 25, 1957]

IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 16572

UNITED STATES OF AMERICA, APPELLANT,

versus

ACME BRICK COMPANY, APPELLEE

Appeal from the United States District Court for the Northern District of Texas

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges

By the COURT:

Pursuant to the Stipulation, and Order entered in the above entitled cause on March 28, 1957 that in the event this Court affirms the decisions in *United States* v. *Reliance Clay Products Co.* (Docket No. 16323), and *United States* v. *Merry Brothers Brick and Tile Co.* (Docket No. 16373), then decision shall be entered forthwith in favor of the taxpayer in the above-entitled

case, and it appearing that the judgment of the District Court in cases Nos. 16323 and 16373 were affirmed on March 27, 1957,

It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[Original Filed—April 25, 1957]

IN THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 16599

ELLIS CAMPBELL, DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE and UNITED STATES OF AMERICA, APPELLANTS,

versus

CARNEY KIRBY and WIFE, GENEVA KIRBY, ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of Texas

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges

By the COURT:

Pursuant to the Stipulation, and Order entered in the above entitled cause on March 8, 1957 that in the event this Court affirms the decisions in *United States* v. *Reliance Clay Products Co.* (Docket No. 16323), and *United States* v. *Merry Brothers Brick and Tile Co.* (Docket No. 16373), then decision shall be entered

forthwith in favor of the taxpayer in the above-entitled case, and it appearing that the judgment of the District Court in cases Nos. 16323 and 16373 were affirmed on March 27, 1957,

It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

[Original Filed—April 29, 1957]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16607

UNITED STATES OF AMERICA, APPELLANT

versus

TEAGUE BRICK & TILE COMPANY, APPELLEE

Appeal from the United States District Court for the Western District of Texas

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges

By the COURT:

Pursuant to the Stipulation filed in the above entitled cause on April 16, 1957 that judgment be entered by this Court affirming the decision of the District Court in view of the decision of this Court in *United States v. Merry Brothers Brick and Tile Company* (Docket No. 16373) and *United States v. Reliance Clay Products Company* (Docket No. 16323), decided March 27, 1957,

It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[Original Filed—May 3, 1957]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16,647

UNITED STATES OF AMERICA, APPELLANT

versus

CHEROKEE BRICK & TILE COMPANY, APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges

By the COURT

Pursuant to the Stipulation filed in the above entitled cause on May 3, 1957 that judgment be entered by this Court affirming the decision of the District Court in view of the decision of this Court in *United States v. Merry Brothers Brick and Tile Company* (Docket No. 16373) and *United States* v. *Reliance Clay Products Company* (Docket No. 16323), decided March 27, 1957.

It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[Original Filed—May 3, 1957]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16,648

UNITED STATES OF AMERICA, APPELLANT

versus

BURNS BRICK COMPANY, APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges

By the COURT:

Pursuant to the Stipulation filed in the above entitled cause on May 3, 1957 that judgment be entered by this Court affirming the decision of the District Court in view of the decision of this Court in *United States* v. *Merry Brothers Brick and Tile Company* (Docket No. 16373) and *United States* v. *Reliance Clay Products Company* (Docket No. 16323), decided March 27, 1957.

It is now here ordered and adjudged by this Court that the judgment of the said District Court in Civil Actions Nos. 1276, 1285, 1326 & 1327, be, and the same is hereby, affirmed.

[Original Filed—May 10, 1957]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16,673

UNITED STATES OF AMERICA, APPELLANT

versus

TEXAS VITRIFIED PIPE COMPANY, APPELLEE

Appeal from the United States District Court for the Northern District of Texas

Before HUTCHESON, Chief Judge, and RIVES and BROWN, Circuit Judges

By the COURT:

Pursuant to the Stipulation filed in the above entitled cause on May 10, 1957 that judgment be entered by this Court affirming the decision of the District Court in view of the decision of this Court in *United States v. Merry Brothers Brick and Tile Company* (Docket No. 16373) and *United States v. Reliance Clay Products Company* (Docket No. 16323), decided March 27, 1957,

It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(m) *Depletion.*—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *

(n) *Basis for Depreciation and Depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * * *

(b) *Basis for Depletion.*—

* * * * * *

(4) [as amended by Sec. 145 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 319 (a) of the Revenue Act of 1951, c. 521, 65 Stat. 452) *Percentage*

*age depletion for * * * certain other mines and natural mineral deposits—*

(A) *In general.*—The allowance for depletion under section 23 (m) in the case of the following mines and other natural deposits shall be—

(i) in the case of sand, gravel, slate, stone (including pumice and scoria), brick and tile clay, shale, oyster shell, clam shell, granite, marble, sodium chloride, and, if from brine wells, calcium chloride, magnesium chloride, and bromine, 5 per centum,

(ii) in the case of coal, asbestos, brucite, dolomite, magnesite, perlite, wollastonite, calcium carbonates, and magnesium carbonates, 10 per centum,

(iii) in the case of metal mines, aplite, bauxite, fluorspar, flake graphite, vermiculite, beryl, garnet, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball clay, sagger clay, china clay, phosphate rock, rock asphalt, trona, bentonite, gilsonite, thenardite, borax, fuller's earth, tripoli, refractory and fire clay, quartzite, diatomaceous earth, metallurgical grade limestone, chemical grade limestone, and potash, 15 per centum, and

(iv) in the case of sulfur, 23 per centum,

of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23 (m) be less than it would

be if computed without reference to this paragraph.

(B) [as added by Sec. 124 (c) of the Revenue Act of 1943, c. 63, 58 Stat. 21, and amended by Sec. 207 (a) of the Revenue Act of 1950, c. 994, 64 Stat. 906, and Sec. 304 (d) of the Excess Profits Tax Act of 1950, c. 1199, 64 Stat. 1137] *Definition of Gross Income from Property.*—As used in this paragraph the term "gross income from the property" means the gross income from mining. The term "mining" as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills. The term "ordinary treatment processes", as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case if iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; and (iv) in the

case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles of this subparagraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 450 and 453.

* * * * *

(26 U. S. C. 1952 ed., Sec. 114.)

Internal Revenue Code of 1954:

SEC. 611. ALLOWANCE OF DEDUCTION FOR DEPLETION.

(a) *General Rule.*—In the case of mines, oil and gas wells, other natural deposits, and timber, there shall be allowed as a deduction in computing taxable income a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under regulations prescribed by the Secretary or his delegate. For purposes of this part, the term "mines" includes deposits of waste or residue, the extraction of ores or minerals from which is treated as mining under section 613 (c). In any case in

which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this section for subsequent taxable years shall be based on such revised estimate.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 611.)

SEC. 613. PERCENTAGE DEPLETION.

(a) *General Rule.*—In the case of the mines, wells, and other natural deposits listed in subsection (b), the allowance for depletion under section 611 shall be the percentage, specified in subsection (b), of the gross income from the property excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 percent of the taxpayer's taxable income from the property (computed without allowance for depletion). In no case shall the allowance for depletion under section 611 be less than it would be if computed without reference to this section.

(b) *Percentage Depletion Rates.*—The mines, wells, and other natural deposits, and the percentages, referred to in subsection (a) are as follows:

(1) 27½ percent—oil and gas wells.

(2) 23 percent—

(A) sulfur and uranium; and

(B) if from deposits in the United States—anorthosite (to the extent that alumina and aluminum compounds are extracted therefrom), asbestos,

bauxite, beryl, celestite, chromite, corundum, fluorspar, graphite, ilmenite, kyanite, mica, olivine, quartz crystals (radio grade), rutile, block steatite talc, and zircon, and ores of the following metals: antimony, bismuth, cadmium, cobalt, columbium, lead, lithium, manganese, mercury, nickel, platinum and platinum-group metals, tantalum, thorium, tin titanium, tungsten, vanadium, and zinc.

(3) 15 percent—ball clay, bentonite, china clay, sagger clay, metal mines (if paragraph (2)(B) does not apply), rock asphalt, and vermiculite.

(4) 10 percent—asbestos (if paragraph (2)(B) does not apply), brucite, coal, lignite, perlite, sodium chloride, and wollastonite.

(5) 5 percent—

(A) brick and tile clay, gravel, mollusk shells (including clam shells and oyster shells), peat, pumice, sand, scoria, shale, and stone, except stone described in paragraph (6); * * *

* * * * *

(6) 15 percent—all other minerals (including, but not limited to, aplite, barite, borax, calcium carbonates, refractory and fire clay, diatomaceous earth, dolomite, feldspar, fullers earth, garnet, gilsonite, granite, limestone, magnesite, magnesium carbonates, marble, phosphate rock, potash, quartzite, slate, soapstone, stone (used or sold for use by the mine owner or operator as dimension stone or ornamental stone), thenardite, tripoli, trona, and (if paragraph (2)(B) does not apply) bauxite, beryl, flake graphite, fluorspar, lepidolite, mica, spodumene, and talc, including pyrophyllite), except that, unless sold on bid in direct competition with a bona fide bid to sell a mineral listed in paragraph (3), the percentage shall be 5 percent for any such other mineral when used, or sold for use, by the

mine owner or operator as rip rap, ballast, road material, rubble, concrete aggregates, or for similar purposes. For purposes of this paragraph, the term "all other minerals" does not include—

(A) soil, sod, dirt, turf, water, or mosses; or

(B) minerals from sea water, the air, or similar inexhaustible sources.

(c) *Definition of Gross Income from Property.*—For purposes of this section—

(1) *Gross income from the property.*—The term "gross income from the property" means, in the case of a property other than an oil or gas well, the gross income from mining.

(2) *Mining.*—The term "mining" includes not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles unless the Secretary or his delegate finds that the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills.

(3) *Extraction of the ores or minerals from the ground.*—The term "extraction of the ores or minerals from the ground" includes the extraction by mine owners or operators of ores or minerals from the waste or residue of prior mining. The preceding sentence shall not apply to any such extraction of the mineral or ore by a purchaser of

such waste or residue or of the rights to extract ores or minerals therefrom:

(4) *Ordinary treatment processes.*—The term "ordinary treatment processes" includes the following:

(A) In the case of coal—cleaning, breaking, sizing, dust allaying, treating to prevent freezing, and loading for shipment;

(B) in the case of sulfur recovered by the Frasch process—pumping to vats, cooling, breaking, and loading for shipment;

(C) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment;

(D) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores; and

(E) the pulverization of talc; the burning of magnesite, and the sintering and nodulizing of phosphate rock.

(26 U.S.C. 1952 ed., Supp. IV, Sec. 613.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.23(m)-1 [as amended by T.D. 5413, 1944 Cum. Bull. 124, and T.D. 6031, 1953-2 Cum. Bull. 120] *Depletion of Mines, Oil and Gas Wells, Other Natural Deposits, and Timber; Depreciation of Improvements.*—

* * * * * *

(f) The term "gross income from the property," as used in sections 114(b)(3) and 114(b)(4)(A) and sections 29.23(m)-1 to 29.23(m)-28, inclusive, means the following:

In the case of oil and gas wells, "gross income from the property" as used in section 114(b)(3) means the amount for which the taxpayer sells the oil and gas in the immediate vicinity of the well. If the oil and gas are not sold on the property but are manufactured or converted into a refined product prior to sale, or are transported from the property prior to sale, the gross income from the property shall be assumed to be equivalent to the representative market or field price (as of the date of sale) of the oil and gas before conversion or transportation.

In the case of a crude mineral product other than oil and gas, "gross income from the property," as used in section 114(b)(4)(A), means the gross income from mining. The term "mining" as used herein includes not only the extraction of ores or minerals from the ground but also the ordinary treatment processes which are normally applied by the mine owners or operators to the crude mineral product after extraction in order to obtain the commercially marketable mineral product or products.

If the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine, "gross income from the property" means the amount for which such product was sold, but, if the product is transported or processed (other than by the ordinary treatment processes described below) before sale, "gross income from the property" means the representative market or field price (as of the date of sale) of a mineral product of like kind and grade as beneficiated by the ordinary treatment processes actually applied, before transportation of such product. If there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude mineral state is merely transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation and the processes beyond the ordinary treatment processes.

The term "ordinary treatment process," as used herein, shall include the following:

(1) In the case of coal—cleaning, breaking, sizing, and loading for shipment;

(2) In the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment;

(3) In the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering (agglomerating by incipient fusion) to bring to shipping grade and form, and loading for shipment;

(4) In the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and minerals which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation; leaching, crystallization, precipitation, or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the mineral. The furnacing of quicksilver ores is included in the term "ordinary treatment processes." The following processes are not included in the term "ordinary treatment processes": electrolytic deposition, roasting, thermal or electric smelting, refining, or substantially equivalent processes.

In addition, the processes listed below are not included in the term "ordinary treatment processes" unless such processes are (i) otherwise provided for in (1), (2), (3), or (4) above; (ii) necessary or incidental to the processes provided for in (1), (2), (3), or (4) above; or (iii) necessary to bring the ores or minerals into condition or form suitable for shipment (for example, the agglomeration of concentrates):

(A) treatment effecting a chemical change,

(B) blending with other material,

(C) thermal action,

(D) fine pulverization, pressing into shape, or molding.

For the purposes of (3) and (4) above, the terms "concentration" or "concentrating" mean the process of eliminating waste or of separating two or more minerals or ores.

In case any of the ordinary treatment processes ar not applied in the immediate vicinity of the minin district in which the mine is located, costs incurre for transportation to the processing location and, i transported by the taxpayer, the proportionate profit attributable to transportation, should be subtracte from the sale price of the product to determine "gros income from the property."

In all cases there shall be excluded in determinin the "gross income from the property" an amount equa to any rents or royalties which were paid or incurre by the taxpayer in respect of the property and are no otherwise excluded from the "gross income from th property." If royalties in the form of bonus payment have been paid in respect of the property in the taxabl year or any prior years or if advanced royalties hav been paid in respect of the property in any taxable yea ending prior to December 31, 1939, the amount exclude from "gross income from the property" for the cur rent taxable year on account of such payments shall b an amount equal to that part of such payments whic is allocable to the product sold during the current tax able year. If advanced royalties have been paid in re spect of the property in any taxable year ending on o after December 31, 1939, the amount excluded fro "gross income from the property" for the current tax able year on account of such payments shall be a amount equal to the deduction for such taxable yea taken on account of such payments pursuant to sectio 29.23 (m)-10(e).

* * * * * *

Treasury Regulations 118, promulgated under th Internal Revenue Code of 1939:

Sec. 39.23 (m)-1. [As amended by T.D. 6059 1954-1 Cum. Bull. 80, and T.D. 6096, 1954-2 Cum

Bull. 69.] *Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.*

* * * * * *

(c) As used in sections 114 (b) (3) and 114 (b) (4) (A) and §§ 39.23 (m)-1 to 39.23 (m)-19, inclusive, the term "gross income from the property" means the following:

* * * * * *

(2) In the case of a crude mineral product other than oil and gas, "gross income from the property," as used in section 114 (b) (4) (A), means the gross income from mining. The term "mining" as used herein includes not only the extraction of ores or minerals from the ground but also the ordinary treatment processes which are normally applied by the mine owners or operators to the crude mineral product after extraction in order to obtain the commercially marketable mineral product or products. The term "mining" as used herein also includes so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles, and, if the Commissioner finds that both the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills, the transportation over such greater distance. * * *

(3) If the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine, "gross income from the property" means the amount for which such product was sold,

but, if the product is transported or processed (other than by the ordinary treatment processes described below) before sale, "gross income from the property" means the representative market or field price (as of the date of sale) of a mineral product of like kind and grade as beneficiated by the ordinary treatment processes actually applied, before transportation of such product (other than transportation treated, for the taxable year, as mining). If there is no such representative market or field price (as of the date of sale), then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude mineral state is merely transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation (other than transportation treated, for the taxable year, as mining) and the processes beyond the ordinary treatment processes. If the taxpayer establishes to the satisfaction of the Commissioner that another method of computation, other than the computation of profits proportionate to costs, clearly reflects the gross income from the property, then such gross income shall be computed by the use of such other method.

(4) In determining "gross income from the property", the sale price of the product shall not be reduced by the costs and proportionate profit attributable to the transportation which is treated for such taxable year as mining, that is, so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto as is not in excess of 50 miles (or, if the

Commissioner finds that both the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills, such greater distance). Where such plants or mills are in excess of 50 miles (or of such greater distance) from the point of extraction from the ground, then costs incurred for transportation in excess of 50 miles (or of such greater distance) to the treatment plant and, if transported by the taxpayer, the proportionate profits attributable to such excess transportation should be subtracted from the sale price of the product to determine "gross income from the property". In the absence of methods which will clearly reflect costs of the various phases of transportation, the costs attributable to such excess transportation shall be an amount which is in the same ratio to the costs incurred for the total transportation to the treatment plant as the excess transportation is to such total transportation. If the taxpayer establishes to the satisfaction of the Commissioner that another method of computation other than the computation of profits proportionate to cost clearly reflects the gross income from the property, then such gross income shall be computed by the use of such other method.

* * * * * *

(f) (1) The term "ordinary treatment processes", as used in §§ 38.23(m)-1 to 39.23(m)-19, inclusive, shall include the following:

(i) In the case of coal—cleaning, breaking, sizing, and loading for shipment;

(ii) In the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment;

sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering (agglomerating by incipient fusion) to bring to shipping grade and form, and loading for shipment;

(iv) In the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and minerals which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation, or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the mineral. The furnacing of quicksilver ores is included in the term "ordinary treatment processes". The following processes are not included in the term "ordinary treatment processes": electrolytic deposition, roasting, thermal or electric smelting, refining, or substantially equivalent processes.

(2) In addition, a treatment effecting a chemical change, the blending with other material, a thermal action, and the fine pulverization, pressing into shape or molding, are not included in the term "ordinary treatment processes" unless such processes are (i) otherwise provided for in subdivisions (i), (ii), (iii), or (iv) of subparagraph (1); (ii) necessary or incidental to the processes provided for in subdivisions (i), (ii), (iii), or (iv) of subparagraph (1); or (iii) necessary to bring the ores or minerals into condition or form suitable for shipment (for example, the agglomeration of

(iv) of subparagraph (1), the terms "concentration" or "concentrating" mean the process of eliminating waste or of separating two or more minerals or ores.

* * * * * *

APPENDIX C

U. S. TREASURY DEPARTMENT,
WASHINGTON 25

OFFICE OF COMMISSIONER OF INTERNAL REVENUE

Address reply to Commissioner of Internal Revenue
and refer to
CC:C:JEB
618418

June 11, 1957.

Hon. Charles K. Rice
Assistant Attorney General
Tax Division
Department of Justice
Washington 25, D. C.

In re: United States v. Merry Bros. Brick and Tile Co. and related cases. (C.A. 5th-No. 16373)

(Your file: CKR:ENS:SIF 5-20-181)

Dear Mr. Rice:

In connection with the recommendation of the office of the Chief Counsel that a petition for certiorari be filed in the above-entitled proceeding, this office completed a survey of cases in active litigation, those pending in the various District Directors' offices and those in the various Appellate Divisions, in an effort to ascertain the anticipated effect upon the revenue of following the rule of this decision in cases presently pending in litigation or administratively.

The results of this survey indicate that the immediate revenue loss which would result from some 451 cases either in litigation or pending at an administrative level for taxable years 1951 through 1955, wherein the rule of this decision was applied to 23 various min-

erals, may be expected to be approximately $134,000,000.00.

A conservative projection based upon current statutory provisions and statistics of income published for these 23 minerals or industries reflects an anticipated annual revenue loss for each succeeding taxable year resulting from industry-wide application of this rule of some $88,000,000.00.

In addition, consistent with the evident extension of this rule, it would appear that on the basis of alleged mining, engineering or economic similarities to these 23 minerals, it is not unreasonable to expect that like claims will be made in the future that barite, bromine, feldspar, graphite, iodine, magnesite and phosphate come under the rule expressed in this case, with an inevitable increase in litigation and attendant sizable loss of revenue.

This data emphasizes the serious importance of this issue from the standpoint of its present as well as its anticipated effect upon the revenue, upon the basis of which the office of the Chief Counsel has recommended that a petition for certiorari be filed in the above-entitled action.

Very truly yours,

(S.) O. GORDON DELK,
Acting Commissioner.

TABLE I

TAX DIFFERENTIAL, ATTRIBUTABLE TO CHEROKEE ISSUE AS REFLECTED CONTESTED CASES (IN LITIGATION AND PENDING ADMINISTRATIVELY) CLASSIFIED ACCORDING TO MINERALS, NUMBER OF CASES AND TAX INVOLVED.

Mineral	Number of Cases		Tax loss under Cherokee Rule	
Limestone (Cement & Lime)	62		88,486,176	
Clay (Brick & Tile)	281		18,082,200	
Fire Clay & China Clay	24		9,962,073	
Talc	3		35,380	
		370		116,565,829
Sodium Chloride	13		11,383,379	
Stone	32		2,828,302	
Dolomite	2		368,485	
Granite	5		204,500	
Shale	5		193,428	
Oyster Shells	1		25,563	
Potash	2		269,000	
Rare Earth Minerals	1		3,344	
Diatomaceous Earth	1		581,481	
Bauxite	1		102,600	
Fullers Earth	4		137,800	
Bentonite	2		69,500	
Calcium Carbonate	1		491	
Perlite	1		3,535	
Asbestos	1		38,274	
Lithium	1		216,000	
Gypsum	1		778,500	
Silica Sand	3		17,158	
Sand & Gravel	4		255,529	
		81		17,476,869
		451		134,042,698

Note: The above table shows only the tax loss to the government which results from the application of the Cherokee rule in 451 cases. The depletion deductions under the Internal Revenue Service rule as well as the Cherokee rule were not shown since information not available in 37 cases. The depletion deductions were available for 414 cases. In these cases the depletion deduction is 118,082,625 under the Internal Revenue Service Rule and 324,362,586 under the Cherokee Brick rule. The figure of $324,362,586 would be increased materially if the missing depletion data for 37 cases was included.

TABLE NO. 2

ESTIMATED TAX DIFFERENTIAL FOR THE MINERAL INDUSTRIES IN WHICH AT LEAST ONE TAXPAYER HAS APPLIED THE CHEROKEE RULE.

Name of Mineral	Depletion Rate %	Gross Income Under Internal Revenue (2) Service Rule	Gross Income Under Cherokee Rule (2)	Difference In Gross Income	Estimated Increase In The Depl. Deduction	Estimated Tax Differential (3)
Calcium Carbonate	10			Data unavailable		
Stone	5			Data unavailable		
Shale	5			Data unavailable		
Sodium Chloride	5	71,010,000	195,000,000	123,990,000	6,199,500	3,223,700
Silica Sand	5			Data not available		
Granite	5	2,000,000	3,000,000	1,000,000	50,000	26,000
Dolomite	10	4,000,000	25,965,000	21,965,000	2,196,500	1,142,180
Clay (Brick & tile)	5	31,180,000	321,891,000	290,711,000	14,535,500	7,558,460
Limestone (Cement)	10	128,610,000	638,512,000	509,902,000	50,990,200	26,514,904
Limestone (Lime)	15	32,292,000	95,231,000	62,939,000	9,440,850	4,909,242
Fire Clay	15	48,383,000	240,196,000	191,813,000	28,771,950	14,961,414
Perlite	10	873,054	7,997,731	7,126,677	712,668	370,587
Talc	15			Data not available		
Bauxite	15	16,776,000	14,605,000	3,829,000	574,350	298,662
Oyster Shells	5			Data not available		
Potash	15			Data not available		
Rare Earth Metals	15			Data not available		
Diatomaceous Earth	15	9,084,380	13,626,570	4,542,190	681,328	354,291
Asbestos	10	4,713,000	23,565,000	18,852,000	1,885,200	980,304
Gypsum (1)	15	22,896,000	224,923,000	202,027,000	30,304,050	15,758,106
Lithium	15	1,052,000	11,000,000	9,948,060	1,492,200	775,944
China Clay	15	25,206,000	175,000,000	14,794,000	22,469,100	11,683,932
Special Clays	15			Data not available		
TOTAL					170,303,496	88,557,818

Notes (1) Gypsum is not allowed percentage depletion under the 1939 Internal Revenue Code but is allowed percentage depletion based on 15% of the gross income under the 1954 Code.

Notes (2) Gross income figures are either taken directly or derived from figures in the U. S. Bureau of Mines 1952 Minerals Yearbook—Vol. I.

Notes (3) Tax computed at the corporation rate of 52%.

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